Internetowy Przegląd
Prawniczy TBSP UJ 2016/7
ISSN 1689-9601

Iwo Jarosz*

The emergence of the parol evidence rule in english law.

Streszczenie

Artykuł niniejszy omawia historyczny rozwój *parol evidence rule* (czyli reguły prawa materialnego zakazującej sądom dopuszczania na okoliczność treści bądź wykładni dokumentu *extrinsic evidence*, czyli dowodów innych niż sam dokument) w angielskim *common law* od czasów prawa anglo-normańskiego aż do uchwalenia w 1677 r. *Statute of Frauds*. Wczesne prawo angielskie charakteryzowała ogólna dopuszczalność takich dowodów. Dokumenty pisemne nie cieszyły się zaufaniem niepiśmiennej społeczności, uważano także, że sama czynność prawna dochodzi do skutku poza dokumentem. Dokument mógł więc mieć w najlepszym razie znaczenie jedynie dowodowe. Potrzeby praktyki handlowej i malejący analfabetyzm umożliwiły pojawienie się przekonania, że istota czynności prawnej zawartej w formie pisemnej jest związana ściśle i zależna od samego dokumentu. Przekonanie owo, wraz z brakiem zaufania i niechęcią sędziów do przysięgłych, jako skorych do wydawania rozstrzygnięć sprzecznych z treścią dokumentów, doprowadziły sędziów do wysnucia *parol evidence rule*. Zasada ta swój najszerszy zakres przyjęła z chwilą uchwalenia *Statute of Frauds*. Wprowadzony wówczas wymóg dokonywania szerokich kategorii czynności prawnych w formie pisemnej pod rygorem nieważności był przez angielskich prawników postrzegany jako potwierdzenie *parol evidence rule* na gruncie ustawowym.

Słowa kluczowe: *Common law,* historia *common law*, procedura cywilna, dowody, historia prawa.

* Autor jest studentem I roku administracji drugiego stopnia na Uniwersytecie Jagiellońskim i aplikantem adwokackim przy ORA w Krakowie.

1. *INTRODUCTION*

In English common law the parol evidence rule is, following the academic definition, a rule that states that any evidence that is extrinsic to a written document (known as parol evidence, where *parol* means not only *oral* but actually pertains to any evidence extrinsic to the contents of a writing) cannot be used to add to, vary or contradict what is encompassed in that writing (in a document)[1].

Even though the parol evidence rule is steadily mentioned and elaborated in numerous modern textbooks[2], it has, since it emerged and reached its peak significance and extent, been subsequently subject to numerous exceptions. Consequently, the rule has been liberalised[3] to such an extent that some have said it does not exist anymore[4].

The purpose of this article, however, is to retrace the changes in the realm of admissibility of extrinsic evidence in written documents since the early Anglo-Norman law and throughout the next centuries in the context of the subsequent emergence of the parol evidence rule and its development up to the early eighteenth century, when it reached its mature form and its peak significance in judicial practice. As early as in the nineteenth century, common law judges began forming exceptions to the rule which subsequently led it to its current status, where some argue that it is highly doubtful that the rule would today, e.g., prevent a party from bringing in extrinsic evidence of terms that the parties intended to form a part of the agreement with[5].

Notwithstanding the above, the strict form of the parol evidence rule meant that it was perceived as a substantive legal rule which stated that if a contract had been done in writing it could not be challenged by past or contemporary extrinsic[6] evidence contradicting it or

---

[1] G.H. Treitel, The Law of Contract, Eleventh Edition, London 2003, p. 346.

[2] See e.g.: Treitel, *above*; R. Stone, *The Modern Law of Contract*, 8th edition, London 2009; S. Williston, *The Law of Contracts,* Volume I, New York 1920, i.a. p. 247-248, ; J. Beatson, A. Burrows, J. Cartwright, *Anson's Law of Contract,* 29th edition, Oxford 2010, p. 138.

[3] *Anson's Law of Contract,* p. 138; Law Commission of England and Wales Report no. 154 (1986), paras 2.3.-2.4.

[4] Law Com Report no. 154, *supra*; K. Lewinson, *The interpretation of contracts*, 1989, pp. 34-37.

[5] A.L. Zuppi, *The parol evidence rule: A comparative study of the common law, the civil law and lex mercatoria,* Georgia Journal of International and Comparative Law, vol. 35, no. 2, 2007, p. 242.

[6] I.e. external to the written instrument (document).

modifying its content. The rule's evolution until it reached its historical peak in terms of its importance and extent in the eighteenth century is the subject of this article.

1.2 PRELIMINARY OBSERVATIONS AS TO THE RULE ITSELF

It is important to notice that in the common law the parol evidence rule is not a rule of evidence[7], a procedural rule[8] or a defence[9]. It is a substantive legal rule dealing with the nature of legal acts[10]. There are actually three specific rules that together form what is called the parol evidence rule[11]: first, preventing the contents of a document being proved by any means other than the production of the document itself[12]; second, pertaining to the inadmissibility of extrinsic evidence for the purpose of adding to, varying, contradicting or subtracting from the terms of the document[13]; and third, providing for the inadmissibility of extrinsic evidence to help in the interpretation of documents. Thus, if these rules were to be rigorously followed, no facts, representations and undertakings of the parties to the contract, apart from what was provided for in the writing itself, could be efficiently enforced as binding, as no evidence to it would be allowed to be accepted by a court.

Nowadays, as was presented above, oftentimes the parol evidence rule appears to be deemed increasingly less rigid, with some scholars suggesting that it is no more than a doctrine according to which the written terms of the contract shall enjoy a "position of interpretive priority"[14]. Such a standpoint is, as we shall see later, consistent with the demise of the parol evidence rule in modern common law, for which, it may well be argued, there were justified reasons. This article, however, shall relate to the "strict version" of the parol evidence rule as described at the beginning of this paragraph.

---

[7] J. Thayer, *Preliminary Treatise on Evidence,* Boston 1898, c. 10.

[8] S. Greenleaf, *A Treatise on the Law of Evidence,* Boston 1883.

[9] As seen in the case of Casa Herrera, Inc. v. Beydoun, 32 Cal. 4th 336, 9 Cal. Rptr. 3d 97, 83 P.3d 497 (2004).

[10] J. Thayer, *Preliminary Treatise on Evidence,* Boston 1898, c. 10.

[11] Law Commission of England and Wales, *Law of Contract: The Parol Evidence Rule* (1976), paras 4 and 5.

[12] Also known as the "best evidence rule".

[13] Thus making the writing conclusive.

[14] James J. White, Robert Summers, Robert Hillman, *Uniform Commercial Code,* § 2-9, at 95.

It shall also be submitted that the aspects of legal acts that the parol evidence rule involves are as follows: the creation of a legal act, its integration, solemnisation and interpretation[15]. This article is concerned with the second aspect above, understood as relating to the conclusiveness of the written instrument, exclusively encompassing the terms of a legal act (here: a contract).

1.3 PERIODISATION

It is proposed that the history of the parol evidence rule's development law can be divided into four periods[16]:

I. From the beginning of Anglo-Saxon rule in England that is roughly parallel to the barbarian invasions in Europe[17] and to the emergence of the seal in the 13th century – a period characterised by a general disputability regarding written instruments and a general prevalence of extrinsic, especially oral, evidence over the contents of documents,

II. from the emergence of the seal to the enactment of the Statute of Frauds and Perjuries in 1677 and the subsequent years – a period when the parol evidence rule finally emerged, began to take hold and reached its historical peak,

III. from then on until the 19th century – a period of slow decomposition and the emergence of exceptions,

IV. from then on until the modern times – a period of stabilisation of the rule with numerous exceptions to its validity.

This article, which aims to retrace the emergence and development of the rule up to the point of its peak significance and its strictest meaning, shall concentrate on the first two periods.

[15] J. Wigmore, *A Brief History of the Parol Evidence Rule*, Columbia Law Review, Vol. 4, No. 5 (May, 1904), p. 338.

[16] Agreeing substantially with Wigmore, *op. cit.*, p. 339, with his division into three periods, one must note that upon the passing of roughly a century from the publishing of his notorious article and having regard for further development (or, as stated above, demise) of the parol evidence rule, another period needs to be listed.

[17] J.L. Myers (*The English Settlements*, London 1986, Chapter 4: *The Romano-British Background and the Saxon Shore*) states that he encountered and identified evidence of the Germanic presence in Britain during Roman rule.

2. ADMISSIBILITY OF EXTRINSIC EVIDENCE AND THE PAROL EVIDENCE RULE IN COMMON LAW UNTIL THE ENACTMENT OF THE STATUTE OF FRAUDS

2.1. EXTRINSIC EVIDENCE IN ROMAN LAW

Early Roman law was characterised by strict formalism with respect to the formation of contracts. For an obligation to come into being, one required to employ *stipulatio* – the traditional oral form of concluding legally binding agreements that was based on a strict question-and-answer formula[18]. At that time, all matters of evidence regarding the formation and content of an obligation were left to the judges' discretion[19]. Later, however, the formalism regarding a *stipulatio* was gradually relaxed. With the diminishing rigidness of *stipulatio* the role of a written instrument – the document – rose. At the beginning the document had a purely evidential meaning, treated by judges as evidence confirming the prior making of a *stipulatio*. The fact that a document contained a promise to carry out a *stipulatio* was thought to prove, by means of presumption, that a *stipulatio* had in fact been done, though contrary evidence was possible and admissible. Nevertheless, it was always clear to the Romans that a contract was concluded "elsewhere", i.e. beyond the document, within the formulas of the *stipulation*. Documents were utilised for purposes of gathering evidence as protection against fading memories and in case of a trial. The importance of what the Roman law contended may seem irrelevant to the later English common law, but the fact that the Roman law had never developed the concept of a juridical act (a contract) coming into existence solely within a writing corresponded with the views of the Germanic peoples that directly formed the roots of the early common law.

2.2. BARBARIAN LAW AND EARLY COMMON LAW – GENERAL DISPUTABILITY OF THE CONTENT OF A DOCUMENT

Contrary, however, to the general formalism attributable to early European mediaeval law, after the fall of the Roman Empire within the legal systems of the Germanic nations there "*was certainly no notion of the indisputability of the terms of a document*"[20]. The formalism of that time extended to modes of carrying out legal acts (e.g. transferring property) but did not result in the indisputability of documents. It is argued that such a situation re-

[18] R. Zimmermann, *The Law of Obligations. Roman Foundations of Civilian Tradition*, Oxford 1996, p. 68.

[19] *Ibidem*, p. 71.

[20] Wigmore, *op. cit.*, p. 339.

sulted from the very character of the Germanic tribes. These tribes were characterised by a general illiteracy, ranging from the lower classes to the elites. Having advanced into Europe, the barbarians brought with them, together with their general illiteracy, a legal system that was based on oral forms of transactions. Though, upon absorbing the lands of a predominantly Roman legal culture they encountered a system based on a preference for written juridical acts and an advanced habit of transactions made via notarial documents, the barbaric traditions seemed to have prevailed. In Merovingian and Carolingian monarchies the old Romanesque trait of using written documents initially subsisted, but by the tenth century it was eliminated, and the post-barbaric populace *en masse* returned to their old means of handling transactions only orally[21].

England, inhabited by Germanic tribes, followed suit. In the early mediaeval period most transactions were oral. "*In pre-conquest England, virtually all business transactions were communicated orally and trusted to memory*"[22]. Even the wills of Anglo-Saxon England, which were unique in that they were often written down by witnesses, did not require any writing: to the contrary, as they were subject to Germanic law, the preparation and signing of a document was not at all required[23]. One of the peculiarities of the early English law was that a document (*carta*) was perceived as one of the symbols convenient in handling formalistic transactions, on a par with a wand, a glove or a knife[24], thus gaining an independent meaning that was separate from its verbal content.

2.3. WHENCE THE RELUCTANCE?

It is hardly arguable that the general illiteracy of the era (ranging from the "*lowest churl to the great Emperor Charles*"[25] was the reason for written documents being perceived as precarious to some extent. Nowadays, used to the fact that we ourselves prepare in detail (or are capable of preparing) and undersign documents, we take it for granted that they are precisely what they are. Then "*the grantor of land, the borrower of money, could neither read*

[21] Ficker, *Beiträge zur Urkundenlehre,* 1887, p. 83-90.

[22] J.R. Wigglesworth, *Science and Technology in Medieval European Life*, London 2006, p. 18.

[23] M.M. Sheehan, J.K. Farge, *Marriage, Family and Law in Medieval Europe. Collected Studies,* Toronto 1997, p. 5.

[24] Wigmore, *op. cit.*, p. 340.

[25] Andreas Heusler, *Institutionen des Deutschen Privatrechts*, Erster Band, Leipzig 1885 [*translation quoted after Wigmore, op. cit*.].

nor write the document […] *he could but mark his cross at the bottom and hope it was alright*"[26]. It is not surprising, then, that a document gained the meaning of a token of transaction. The seller of land could transfer the title by the old form of *sale* and *vestitura* or he could simply transfer it via the document (through "*venditio per cartam*"). The *tradition carta* itself in land transfers was a formalised act, done by the document signor grasping a blank parchment, lifting it from the ground, asking the witnesses to grasp it with him, handing it to the scribe to do the writing and, finally, handing it over, i.e. delivering it, to the purchaser. The convenience of *venditio per cartam* lay in the ability to transfer land symbolically, i.e. without the requirement of being present at the land being sold. Ficker, though, accurately noticed that it also allowed the names of the witnesses to be preserved in writing[27]. What is, however, essential here is that, from a substantive point of view, the *carta* was not capable of establishing anything[28], i.e. neither legally nor in any other way bindingly. Any terms encompassed in the *carta* were subject to dispute, and if they were indeed disputed – "*the terms of the transaction may and must be proved by calling the witnesses to it, regardless of any contradiction of the writing*"[29]. Wigmore provides us with an exemplary case that was symptomatic for the then reigning premonitions as to the contestability of documents by other evidence. It shall be underlined that the case concerns a dispute that took place over two centuries after the Norman conquest, namely in 1292. This case[30] concerned a plaintiff filing an assize of mort d'ancestor[31] and seeking to recover his seisin[32] of tenements in a place recorded as "C.". The defendant replied that he was in good (legal) possession of the lands in question as he had been properly enfeoffed by the plaintiff's father. As a means of evidence the defendant produced a charter (a written document), which was a deed of the plaintiff's father. The plaintiff then admitted to the deed being his father's but stated that the tenements had been given to the defendant for one month only, upon the

[26] Wigmore, *op. cit.*

[27] Ficker, *op.cit.,* p. 85.

[28] Wigmore, o*p. cit.*, p. 341.

[29] *Ibidem.*

[30] Year Book 20 Edw I, 258 (*Edition Horwood*).

[31] An action filed by a plaintiff who wanted to recover the possession of an inheritable estate of his predecessor, usually his father (see: Black's Law Dictionary, 9th Edition, p. 1101, *mort d'ancestor*).

[32] I.e., *Possession.*

passing of which the defendant was supposed to have married the plaintiff's sister or return the tenements to the plaintiff's father. None of these conditions were in fact included in the charter. The plaintiff's father had died before the passing of the month and the defendant had not wed his opponent's sister. The defendant replied again that the deed was simple and that there were no conditions to be found within its content as the ones alleged by the plaintiff. The plaintiff, however, replied that whatever the words of the charter may have been, the arrangements of the covenant between his father and the defendant and their friends had been just as he claimed. The jury stated that the contract was as the plaintiff had motioned and the judge entered judgement for the plaintiff upon establishing that the defendant's seisin was conditional, that the condition had not been performed by the defendant's default and therefore his seisin was null, the plaintiff's father had died seised of his estate and therefore the plaintiff was awarded the assize. Here we can see very well how a written document, unambiguous, unequivocal and clear, was legally perceived as containing only some of the parties' stipulations, and how oral evidence had helped the plaintiff win the case.

Another proper demonstration of the then reigning rule of admissibility of extrinsic evidence against written contracts was the so-called wager of law[33] – a defence allowing the defendant to prove his lack of liability by proclaiming it under oath and gathering a required number of witnesses (called the compurgators – usually eleven[34] or twelve of them, sometimes more[35]), to swear that they believed the defendant's oath[36]. A successful wager of law was sufficient to outweigh a written document[37] (as Blackstone puts it: "*he shall go free and for ever acquitted of the debt, or other cause of action*"[38]).

Obviously, the very fact that we say that a wager of law was sufficient to outweigh a written document it may be inferred that there were certain instances when a written document would suffice to prove the plaintiff's case, or when a piece of writing would, in the ambiguity of other evidence, serve as decisive, but nevertheless this means that a document

[33] Known in Latin as v*adiatio legis.*

[34] John Bouvier's Law Dictionary, Revised 6th Edition, Philadelphia 1856.

[35] Þorleifur Guðmundsson Repp, *A Historical Treatise on Trial by Jury, Wager of Law and other Co-Ordinate Forensic Institutions.*

[36] J.H. Baker, *An Introduction to English Legal History*, 4th edition, London 2002, p. 6.

[37] Wigmore, *op. cit.*, p. 340.

[38] Sir William Blackstone, *Commentaries on the Laws of England. Volume 2,* New York 1828.

was contestable by other evidence. There was simply no recognised law that would prevent writing from being prone to being contested by other forms of evidence. As O.W. Holmes put it: "*It was evidence either way, and is called so in many of the early cases*"[39].

It shall thus be summed up that in the early mediaeval period, i.e. from the beginning of Anglo-Saxon rule in England until well after the Norman conquest of 1066, there was no such notion in the common law as the parol evidence rule nor were there any earlier forms of it. It was a period of the dominance of oral forms of juridical acts and especially of oral evidence. No substantive legal rules existed that would pertain to written instruments being irrebuttable by extrinsic evidence.

2.4. RISE OF THE SEAL[40] – A PREREQUISITE FOR THE PAROL EVIDENCE RULE

The tell-tale element of what was characteristic of the second of the periods mentioned above began with the so-called *rise of the seal*. The seal was a piece of wax affixed to a paper or other material on which a promise, release or conveyance was written that served as a means of proving its authenticity[41]. It originally consisted of wax bearing the imprint of an individualised signet ring, and though this requirement was relaxed in the 19th and 20th centuries, throughout the periods described in this article it did not change. As late as in the 17th century, Lord Coke stated that wax without an impression was not a seal[42]. Use of the seal in England began in the 11th century[43], after the Norman conquest, but it was not until it became common among ordinary people that its importance as a contractual instrument began, and only since then can we perceive it as a factor in the emergence of the parol evidence rule. At first it was used exclusively by the king, thence its legal value sparked from the principle that the king is not capable of attesting lies and receiving lies from his subjects, and that his word is indisputable[44]. The king's seal affixed to a document made the truth of

[39] O.W. Holmes, *The Common Law*, New York 2009, p. 184.

[40] See, generally: E.M. Holmes, *Stature and Status of a Promise under Seal as a Legal Formality*, "Willamette Law Review" 617 (1993), p. 625-637.

[41] *Black's Law Dictionary*, p. 1466, *seal.*

[42] *Restatement (Second) of Contracts*, 1979, § 96 cmt. A.

[43] Frederick Pollock, Frederic William Maitland, *The History of English Law before the Time of Edward I,* London 1898, vol. I, p. 78.

[44] Wigmore, *op. cit.*, p. 342.

the document immune to being undermined. The attestation of a private document by the king or his representatives was much sought after[45].

The popularity of the seal "trickled down" from the king to, first, senior members of the clergy (bishops) and counts to, later, an ever-growing part of the nobility and estate-holders. What is peculiar here is that the relevance of the king's seal was attributed to seals used by other people. Then it became, as Ficker duly notes, popular for those that had not yet obtained a seal (for various reasons) to ask those that possessed the benefit of having a seal to attach it to a document, thus guaranteeing its authenticity[46]. As Wigmore states: "*as the habitual use of seal extends downwards, its valuable attributes go with it*"[47]. The reason, as some suggest, may simply be the fact that a seal is more difficult to forge than a signature, not to mention an illiterate mark made with the stroke of a pen[48]. Ultimately, this led to ordinary freemen obtaining and using seals. The process of the seal gaining in importance to the point that it became common had, as we have seen, begun in the 11th century, and was not rapid at first – after all, as late as during the times of Henry II seals were said to belong properly only to kings and to very great men[49]. Notwithstanding, the process of seals becoming common was practically complete by the thirteenth century[50] – "*at the date of the Conquest the Norman duke had a seal* […] *before the end of the thirteenth century the free and lawful man usually had a seal"*[51]. This marked the dawn of the significance of transaction witnesses, as the qualities of a witness were attributed to the seal and the parties could expect a sealed document to be a sufficient means of proving that a transaction had taken place. They could also rely on (though only to some extent, as we shall soon see) a sealed document to prove the terms of such a transaction because the potential opponent, having certified the given document with his seal, could not renege on its terms anymore. Neverthe-

[45] *Ibidem.*

[46] Ficker, *op. cit.*, p. 94.

[47] Wigmore, o*p. cit.*, p. 342.

[48] Holmes, *op. cit.*, p. 184.

[49] *Ibidem.*

[50] Harry Bresslau, *Handbuch der Urkundenlehre*, Leipzig 1889, p. 534.

[51] Pollock and Maitland, *op. cit.*, p. 221.

less, the situation was far from allowing one to form a general rule that would have prohibited the use of extrinsic evidence against a written instrument as of then.

2.5. OBSTACLES AGAINST THE EMERGENCE OF THE PAROL EVIDENCE RULE IN THE LATE MIDDLE AGES – EVOLVING CONCEPTS

Though the basic notions of the indisputability of a document and the incontestability of its terms had developed, as can be observed, before the end of the thirteenth century, still the parol evidence rule was far from emerging and the general significance of written instruments was very distant from its final form. What were the reasons for this?

It must be underlined here that transactions which were most important at that time – which, for obvious reasons, were those pertaining to land – were still performed in the old ritual forms. The transfer of an estate was done by the so-called *livery of seisin* (roughly equivalent to the continental transfer of possession), to which the charter was only secondary. As Wigmore put it: "*whatever the virtue there is in writing is testimonial only*"[52]. This, it is fair to say, was a very peculiar state of matters and one that was very prone to lability. A written document was no more and no less than proof of a transaction, not a necessary one, but otherwise hardly contestable (if at all present). One may ask if it was thus not tempting for the parties to gain for themselves a piece of indisputable evidence, and was not the inadmissibility of extrinsic evidence the only logical conclusion of attributing incontestability to the documents? The answer is yes, but there was the obstacle as described above. The fact was that the main part of a transaction was some juridical act done apart from the writing. Most of these acts, especially those concerning immovable property, were done in oral forms[53]. A writing merely "testified", i.e. "witnessed" what was in fact done beyond the writing itself[54]. The important, substantive element of a transaction happened elsewhere. If so then why dully accept the terms of the writing? If the writing is no more than just evidence, it may always be countered with contrary evidence.

---

[52] Wigmore, *op. cit.*, p. 343.

[53] Pollock and Maitland, *op. cit.* p. 202 & 217.

[54] Interestingly, this rhetoric persisted much later, at a time when undoubtedly a document was more than just the evidence of an act completed beside the document. William Sheppard, *Touchstone of Common Assurances*, 7th Edition, London 1820, p. 50: "*a deed is a writing or instrument* […] *sealed and delivered to prove and testify the agreement of the parties whose deed is to the thing contained in the deed*).

2.6. THE LAW OF COMMERCIAL TRANSACTIONS – A HARBINGER OF THINGS TO COME

One area of law where the idea of the indisputability of written documents appeared earliest and quickly gained a serious foothold was commercial law. In this area a sealed document was deemed as incontestable as early as in the 1300s[55]. Such was the mercantile custom that became, not formally, an element of the *lex mercatoria* (or the *Law Merchant*, as it is usually called in England). This was obviously caused by the specificity of merchants' activities in an era predating most developments such as banks and systems of shipping. A direct and immediate concern for the merchants of that time was the problem of "*making returns*" – meaning simply carrying back the fruits of one's trading journeys. Related to this was the problem of recovering funds, especially pecuniary proceeds from successful trade ventures from abroad. One of the ways that the mercantile practice dealt with these problems was with the emergence of the "*sedentary merchant*", i.e. an element of a new form of a trade organisation based on a complex structure. "*In the simplest form, the merchant would entrust the goods to an agent or an employee who travelled with the goods and arranged for their sale and the purchase of return cargo*"[56]. Such a sedentary merchant could, via a network of agents, representatives and consignees who were interconnected and autonomous to some extent, solve the problem of making returns and returning funds – what was of essence, though, was the ability to offer in the mercantile transactions a form of remuneration that would be commonly accepted, and such could only be a form of remuneration that was safe and sure. Merchants, especially the Staplers of London in their trade relations with the mercers of Flanders[57], would draw up the so-called exchange bills that would allow them to transfer value without physically carrying money. These later evolved into the more modern bills and notes. It is not by any means surprising that the doctrine of the incontestability of written documents appeared the earliest, then, with respect to commercial contracts. What made it easier and what probably accelerated the emergence of such a doctrine in commercial relations was the fact that commercial cases were often tried not by the

[55] Wigmore, *Op. cit.*, p. 344.

[56] J.S. Rogers, *The Early History of the Law of Bills and Notes*, London 1995, p. 33.

[57] E. Power, *Wool Trade in the Fifteenth Century* [in:] *Studies in English Trade and in the Fifteenth Century*, E. Power, M.M. Postan (eds.), London 1933, p. 39-90.

common law courts but by separate mercantile courts[58]. On the other hand, this same fact slowed down diffusion of the doctrine to common law courts.

There exist in the records some landmark cases that show very well how the doctrine of the incontestability of written instruments worked in the area of commerce. First is a case from 1222, where it was stated that "*by the law merchant a man cannot wage his law against a tally*"[59]. If such was the approach toward a tally then even more so toward a written document. The same rule is also confirmed in a legal treatise concerning precedents useful for pleading in the courts[60]. It is, however, important not to overemphasise these developments in the light of the following excerpt from Pollock and Maitland: "*by Law Merchant one cannot* [sic!] *wage his law against a tally; but if he deny the tally, the plaintiff must prove the tally*"[61]. So a mere denial was sufficient to turn the burden of proof against the claiming party. Clearly, the commercial law of the thirteenth or fourteenth century is too early a period to talk about anything as strict as the parol evidence rule in its strict form.

2.7. RELUCTANCE WITHIN THE LAW OF THE LAND TRANSACTIONS – UNCERTAINTY AND TRANSITION

In the fourteenth century, deeds regarding the transfer of estates started to become "necessary accompaniments"[62] of the livery of seisin. This was definitely a sign of things to come (as we shall see with respect to the Statute of Frauds), but the incontestability of writing, not to mention the inadmissibility of extrinsic evidence to the writing, was still a weak concept as late as in the mid-fifteenth century. A renowned legal scholar of the epoch, Thomas de Littleton, famously stated[63] that if parties make a deed of feoffment[64] stipulating the transfer of estate under no condition, but in executing this deed the livery of seisin is provided with a condition, i.e. an oral one, then that condition is good and enforceable. The

[58] Rogers, *op. cit.*, p. 58.

[59] Year Book 20 Edw. I, p. 68.

[60] *Brevia Placitata* (Publications of the Selden Society, vol. 66, London 1951); *Casus Placitorum and the Reports of the Cases in the King's Court 1272-1278*, ed. with an introduction by William Huse Dunham (Publications of the Selden Society, vol. 69, London 1952).

[61] Pollock and Maitland, *op. cit.*, p. 213.

[62] Pollock and Maitland, *op. cit.*, p. 82.

[63] Or actually noted what was the law in his times.

[64] Roughly equivalent to the transfer of property in Continental law.

deed is treated as if it had not been made because it contains no condition, and the terms of the transaction are actually as provided for at the making of the livery of seisin[65]. The same author also stated that even though theoretically there could be no condition effectively affixed to a lease of a freehold estate if the lease had not been made in a deed, the party eager to resort to the condition before a court of law could rely on "*a verdict of twelve men taken at large*" even if he "*letteth the same land to another for term of life without deed upon condition to render to the lessor a certain rent*"[66]. Littleton wrote *Tenures* after he became a judge of the common pleas in 1466[67]; the first edition was published in London in 1481 or 1482[68]. It is difficult not to notice that after all the legal and social changes described above the law regarding land transactions would not produce a judgement varying from the one referred to above that had been rendered during the rule of Edward I roughly two centuries earlier. The huge similarity lies in the ability of the jury to overthrow the clear and explicit terms of a deed or to ignore the lack of a deed where the law would ostensibly require one.

Why then shall we call this period a period of transition? Mainly because the sources offer contradictory evidence as to the then reigning approach to matters that were very similar. First, the same Littleton states that he recognises as a matter of "*common learning*" that a man cannot plead that an estate was made upon condition "*if he doth not vouch a record of this or show a writing under seal proving the same condition*"[69]. Of course, this opinion does not pertain to the inadmissibility of extrinsic evidence to the contents of a written instrument but to the inability to prove a condition without a writing. But it does show very well that the law, settled beforehand, had started shifting in the realm of land transactions.

Then again, in a Year Book from as late as 1523 we can find the following opinion contradicting what was written earlier by Littleton: "[…] *for a deed is nothing but a proof and testimonial of the agreement of the party, as a deed of feoffment is nothing but a proof of the livery, for the land passes by the livery; but when the deed and the livery are joined*

---

[65] Thomas de Littleton, edited by: Eugene Wambaugh, *Littleton's Tenures in English*, Washington, D.C., 1903, p. 171.

[66] *Ibidem*, p. 174.

[67] *Gilman, D. C.; Thurston, H. T.; Colby, F. M., eds., New International Encyclopedia* ***vol. 12****, 1st ed., New York 1905, "Littleton, Thomas", p. 340.*

[68] It is worthwhile to notice that the first edition of *Tenures* was the first book ever printed concerning English law.

[69] Littleton, *op. cit.*, p. 173.

together, that is a proof of the livery"[70]. This is yet another contradicting statement as to the significance of a deed and its immunity (here its lack) to being overthrown by parol. However, the common opinion was soon about to change. In fact, even in the fifteenth century certain judgements had been rendered that disallowed extrinsic evidence against the contents of written documents, as we shall later see.

2.8. CONTRIBUTING FACTORS AND THE EMERGENCE OF THE PAROL EVIDENCE RULE

As we turn to examine these judgements in order to recreate, finally, the story of how the parol evidence rule gained foothold, we shall also focus our attention on the factors and circumstances that facilitated the rule's growth.

2.8.1. GROWING LITERACY

First, there was the unquestionable growth of literacy. In England, the approximate literacy rate rose from less than five per cent in the mid-fifteenth century to about 15% in 1550 and, astonishingly, to approx. 53% in 1650[71]. Putting aside the reasons for this – the most important probably being the invention and spread of printing – the result of the society becoming generally much more lettered was a rise in respect shown to written documents and, obviously, the dropping of earlier distrust toward charters. Because reading and writing were no longer the mysterious skill of a chosen few, there spread the notion that a man should generally be bound by what he declared in writing[72]. The idea grew that the written words of a transaction should be binding to the denying party, as they could easily prevent against the writing being deficient in some terms and representations[73]. In what may be perceived as one of the early instances of the full-fledged parol evidence rule's application in a case[74], it was famously stated: "*because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind with-*

---

[70] As per Brudnel, J; *Year Book* 14 H. VIII 17, 6 and 7.

[71] Max Roser, *Literacy, Published online (2016) at OurWorldInData.org,* Retrieved from: https://ourworldindata.org/literacy/, 28.04.2016.

[72] Wigmore, *op. cit., p. 345.*

[73] First noted as early as in 1430, Year Book 8 H. VI, 26, 15, per Babington, J, speaking of a party that had neglected to seeing to encompass certain provisions in a deed: "*It will be adjudged my own folly that I did not wish to have it written in*".

[74] Sharington v. Strotton, 75 ER 454.

out consideration. And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed there is more time for deliberation". Then the judge added that deeds were "*adjudged to bind the party without examining upon what cause or consideration they were made*" to, ultimately, find that a sealed deed is of a higher nature than other means of evidence.

It is worth noticing, however, that the spread of literacy itself was not sufficient for the rule to appear – otherwise it would have appeared to be applied whenever both parties to a contract could have been proved to be literate[75]. Thus more contributing factors were required for the parol evidence rule to emerge.

2.8.2. THE GROWING PERCEIVED TRUSTWORTHINESS OF WRITING

Another factor was that the old custom of transaction-witnesses, which were especially prevalent in liveries of seisin, was slowly becoming increasingly less popular, up to the point that transaction-witnesses were not commonly available[76]. Together with this there grew a general awareness of the lability of witnesses and the weakness of testimonial recollection. On the other hand, there appeared a growing sympathy for writing as being sure and trustworthy. Judges realised that there was something wrong with the ability to deny a matter recorded in writing by simply denying it[77]. As Lord Coke stated (in a case that we shall return to later): "*it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give*"[78]. It is argued that the spread of written contracts was tightly related to the change from a subjective theory of contracting (one that states that an agreement exists beyond the contract understood as a written instrument) to an objective one (asserting that the document is actually the contract itself)[79].

2.8.3. MERCANTILE CUSTOMS

[75] Note that in the case cited above under 31 both parties had been literate, and still witness evidence was allowed to alter the contents of the writing.

[76] Wigmore, *op. cit., p. 346.*

[77] *Ibidem*, p. 347.

[78] 1591, Lord Cheyney's Case, *The reports of Sir Edward Coke, in English, in thirteen parts complete; with references to all the ancient and modern books of the law* [*Coke's reports*]*, Part 5*, sec. 68a.

[79] T. Cole, *The Parol Evidence Rule: A Comparative Analysis and Proposal*, University of New South Wales Law Journal, Vol. 26, 2003, p. 682.

Next, as we have already seen, the path had been paved beforehand by the mercantile customs and the Law Merchant. The merchants of England, especially of London, were using commercial forms, principally bills and notes which had developed in the previous centuries, as a means of hastening and simplifying transactions. The mercantile practice had already ascribed the value of indisputability to written documents.

2.8.4. RESTRAINING THE JURIES

The third factor was a more legal-political one that was related to the judicial desire to control the jury[80]. Judges, as professional lawyers, were always wary of juries and their ways of twisting the factual backgrounds of cases so as to bypass the law. Judges wanted to keep from the jury the oral parts of contracts to prevent them from misusing the parol (i.e. *oral*) evidence to overturn the words of a writing. "[…] *the distrust of the juries is one of the pillars of the parol evidence rule…* [which] *…is not applicable in equitable actions that traditionally were tried to the chancellor without a jury*"[81].

Interestingly, is has been pointed out that a very similar process is taking place nowadays, with the courts perceiving restrictions to the admissibility of extrinsic evidence as a method of preventing juries from "*hearing evidence that could cause them to lend more weight to their sympathies than to the facts of the case*[82]".

The cases cited earlier in this article show very well how a jury could tear a written instrument apart if it so willed. If parol evidence was generally allowed then the case had to be decided by a jury on its factual terms, "*and there was no telling what the jury might do*"[83]. As a judge stated in a later case[84], every deed was thought to consist of two parts – the matter of fact and the matter of law. The matter of fact was averred by the party and was triable by the jurors; the matter of law, however, was to be discussed by the judges of the law. If the matter of fact was as strict as it was worded in a deed then clearly the whole adjudication belonged solely to the judges. And so if the judges wanted to keep control of an adjudicated

[80] *Ibidem*.

[81] J.M. Perillo, *Comments on William Whitford's Paper on the Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, "Wisconsin Law Review" 965, 6/2001.

[82] William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 Wisconsin Law Review, p. 931.

[83] J.M. Perillo, *op. cit.*

[84] 1610, Edward Altham's Case, *Coke's Reports*, *Part 8,* sec. 155.

case in their hands, a doctrine had to be adapted which would exclude parol evidence as such.

This required that the judges switch from how the inadmissibility of extrinsic evidence was perceived earlier, i.e. as a testimonial rule, to a new approach that would finally make it a rule of substantive law. Earlier, as the parol evidence rule was gaining a hold, it was reduced to being a waiver of ordinary proof. A person who had produced a sealed document was disallowed to effectively come forward with contradictory evidence of other sorts. This ban, however, was operative by a legal fiction that the person had in fact waived his right to bring his evidence and had done so in advance[85]. He was, as it was worded in the epoch, estopped from using extrinsic proof, and by his own sealed act. Later this evolved, however, into a substantive law rule.

How considerably significant in the process of the emergence of the parol evidence rule was the judges' distrust toward juries may well be demonstrated by noting that the parol evidence rule never emerged in equitable actions[86]. This must be deemed very telling upon reflecting that actions in equity had always been tried in a chancery court, i.e. before a chancellor and without a jury.

2.8.5. THE PAROLE EVIDENCE RULE AS A MEANS OF CORRECTING THE "OBJECTIVE INTENTION" DOCTRINE

This general lack of trust toward juries was recently also underlined as one of the major factors for the emergence and prevalence of the parol evidence rule in English law together with the notion of *objective intention*[87]. Some authors have even described this aforementioned notion as the reason for the general literalism that is prevalent in common law and in common law interpretation[88]. The *objective intention* rule is understood by English courts as the need to enforce the intention "*which the party in question by his actions or words displays to the other, not some hidden intention which he may have concealed in the inner reaches of his mind*"[89]. Interpreting *objective intention* inevitably leads to one asking oneself

[85] Wigmore, *op. cit.*, p. 347.

[86] J.M. Perillo, *op. cit.*, p. 965.

[87] T. Cole, *op.cit.*, p. 680.

[88] C. Valcke, *Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric* [in:] J.W. Neyers, R. Bronaugh, S. G.A. Pitel, *Exploring Contract Law*, Oxford 2009, p. 95.

[89] See Canadian case of Double N Earthmovers Ltd v City of Edmonton [2007] 275 DLR (4th) 577.

whether this *objective intention* is tantamount to *what the reasonable parties truly had in mind* or maybe to *what the parties should have had in mind had they been reasonable*. The second concept is visibly flexible and allows for a high level of judicial discretion. One of the factors that helps limit the influence of the notoriously vague notion of objective intention in contractual interpretation is the inadmissibility of extrinsic evidence; for where objective intention matters, evidence of intention is just as important as the intention itself[90], and thus the restrictive approach to whence the evidence may be drawn. Disallowing the courts to search for meaning somewhere beyond the scope of a written instrument helps restore the certainty that the doctrine of objective intention could not provide if supplemented with the courts' ability to utilise extrinsic evidence.[91].

2.8.6. THE DIFFERENT QUALITIES OF DIFFERENT EVIDENCE

Then there appeared the concept of varying qualities of certain means of evidence. We have already seen this in the case of Sharington v. Strotton, where the court determined that certain acts are not to be overthrown by other proof because of the former's higher nature – thus assuming that juridical acts may be of varying, i.e. higher or lower, nature. Francis Bacon, moreover, in a treatise regarding the rules of common law of the time, asserted that a patent ambiguity in a document may not be averred because "*the law will not couple and mingle matters of specialty, which is of a higher account, with matter of averment, which is of inferior account in law*"[92]. Finally, in a decision regarded as formative and decisive to the emergence of the parol evidence rule[93], parol evidence was unambiguously dismissed because "*every contract or agreement ought to be dissolved by matter of as high a nature as the*

first deed".

The new approach also saw a shift in how written documents were perceived. Earlier, a deed was but proof of a transaction that took place beside it. This notion is, interestingly, still prevalent in American law, where dominant is the subjective theory of contracting ac-

[90] Ibidem, p. 98.

[91] C. Valcke, op. cit., p. 97.

[92] F. Bacon, *A Collection of Some Principal Rules and Maximes of the Common Lawes of England*, London 1963, 91, Regula 23.

[93] Countess of Rutland's Case (1605), *Coke's Reports*, Part 6, sec. 52b.

cording to which the written document produced by the parties is merely a memorandum of the agreement that they have reached[94]. "Judges adhering to this doctrine have no qualms about admitting extrinsic evidence in order to ascertain each party's intent, even where the parties thought that they had created a final expression of their agreement"[95]. The fourteenth century was a period when this concept was struggling for approval, but by the early 1600s[96] it was already settled that the written document is the transaction itself. This concept is called the *operative notion of a writing*. Wigmore argues that the development of the operative notion of a writing was reinforced by the development of the parol evidence rule understood as a rule of inadmissibility of extrinsic evidence. If no extrinsic evidence is admissible, then a sealed instrument will "discharge" all earlier transactions or stipulations pertaining to what is embodied in the instrument. All previous arrangements are not demonstrable, so the whole contractual relation of the parties is reduced to what is written; and only that of the previous arrangements is binding what the parties merged into the written form. Thus there is no transaction beyond what the parties had encompassed in the writing and thus – the writing itself becomes the transaction[97].

If the writing is the sole act encompassing the whole transaction and is the transaction itself, then it is because of its very nature that no extrinsic evidence shall be allowed. There simply is no point in not dismissing it, because even if it stood in total contrast to the contents of the deed the deed would still prevail intact. The logical conclusion is to accept that it is owing to the nature of the writing that it should not bail extrinsic evidence. Thus it becomes clear how the parol evidence rule became a rule of substantive law, not just a procedural one.

It is worthwhile to take into scope the case usually credited as the one in which the parol evidence rule was established in its fullest form (prior to the enactment of the Statute of Frauds). Some authors, even nowadays, go as far as to state that the parol evidence rule's

[94] T. Cole, ibidem, p. 681.

[95] S. Schane, Ambiguity and Misunderstanding in the Law, 25 Thomas Jefferson Law Review 2002, p. 167.

[96] Wigmore, *op. cit.*, p. 350.

[97] *Ibidem*, p. 349.

origins may be traced to this case[98], however, in the light of the previous remarks this cannot be deemed true – it is fair to say there are further reaching traces of the rule.

The Countess Rutland's Case (1605)[99] actually concerned a trespass allegation brought forth by the Countess Isabel, the widow of Edward, the third Earl of Rutland, against Roger – the fifth Earl of Rutland. The dispute arose from a conflict between two written contracts that had both been made by Edward and concerned a property by the name of Eykering House, and both were about entrusting the property. The first of these contracts stipulated that upon Edward's death the trustees shall ensure that the property stay in Isabel's possession, and only after her subsequent death should it be conveyed to Roger. The second contract, made half a year later, concerned a vast set of lands including Eykering House, and under the term that the property shall be conveyed to Roger after Edward's death. As Coke's report tells us, the witnesses' testimonies proved that Edward had told various people that Isabel shall have the property. The court, however, held that a written deed would bar parol evidence. Moreover, such were the instructions that the judge provided to the jury. Coke commented that "*it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory*".

2.9. STATUTE OF FRAUDS OF 1677 – PEAK SIGNIFICANCE OF THE PAROL EVIDENCE RULE. OBJECTIVE THEORY OF A CONTRACT

The waiver theory as discussed above was complacent with the subjective theory of contracting according to which the existence of a binding agreement between the parties is determined by the existence of the concurrence of intention. Modern theory of contracts in common law prefers the objective approach, which relies on external acts of the parties to determine the existence and contents of a contract.

The processes as described above, influenced by the factors therein listed, led to the final taking of shape of the parol evidence rule in the late seventeenth century[100]. The emer-

[98] See e.g. Epstein G., Archer T., Davis Sh., *Extrinsic Evidence, Parol Evidence, and the Parol Evidence Rule: A Call for Courts to Use the Reasoning of the Restatements Rather than the Rhetoric of Common Law*, 44 N. M. L. Rev. 49-87 (2014), p. 57.

[99] Coke's Reports, Part 6, sec. 52b.

[100] Kevin M. Teeven, *A History of the Anglo-American Common Law of Contract*, New York 1990, par. 110 n. 89.

gence of the second approach was facilitated by the enactment of the Statute of Frauds[101] in 1677. The Statute in its first and third sections mentioned an estate in land as being "assigned, granted or surrendered" by "deed or note in writing". This brief but novel regulation brought forth two important notions: first, it confirmed that a legal act might not only be proved by a writing but that it may actually be constituted by the document – the document itself being the very act it encompassed. Furthermore, the Statute not only confirmed but actually made it a requirement for effective conveyances that the transfer of ownership be made in writing.

At the same time, the Statute introduced the novel feature that a document might be an ordinary piece of writing in its simplest form, not necessarily a deed under seal. Wigmore argues[102] that the significance of the Statute was mainly that it, first, eliminated the possibility of creating, granting and leasing estates in freehold by oral livery of seisin, thus substituting it with a mandatory documental form. Second, it permitted for the document to be just an ordinary piece of writing – without the seal. The requirement of a written form for the transfer of an estate underlined the constitutive (as opposed to testimonial only) character of a document. The acceptance of ordinary writing as a means equivalent to a deed led the courts to apply the parol evidence rule to everything that had been encompassed in writing, notwithstanding the lack of a seal[103]. The reasons for this seem quite clear. If a certain transaction must be done in writing, as otherwise it is null and void, then everything undertaken, discussed or done beyond the writing is also null and void. The lawyers of the era were convinced that if a contract requires that it be done in writing to be valid then nothing shall be established in court based on evidence extrinsic to that writing.

What is even more interesting is that the Statute of Frauds became a source of inspiration for arguments pertaining to matters not regulated in the Statute itself. And so the Statute was believed to typify a general principle. In a certain case in 1696[104], for instance, which did not regard the transfer of an estate, parol evidence with respect to the testator possessing, in fact, an intention contrary to the contents of a will was dismissed. Lieutenant

[101] An Act for prevention of Frauds and Perjuryes, 1677, 29 Car 2 c 3.

[102] Wigmore, *op. cit.*, p. 351.

[103] *Ibidem*, p. 352.

[104] Falkland v. Bertie, 2 Vern. 333.

Chief Justice Holt even stated that: "*the great uncertainty there is of proof in this case shows how necessary it was to make the statute against frauds and perjuries*". These words perfectly show how the Statute of Frauds was interpreted as a regulation that disallowed the admissibility of extrinsic evidence contrary or additional to a writing.

3. CONCLUSIONS

From the early Anglo-Norman law to the enactment of the Statute of Frauds, the issue of the admissibility of extrinsic evidence to add to, vary or contradict the contents of a writing underwent vast changes. Concepts and notions shifted, sometimes heavily, sometimes only slightly – but to produce very different results. The specificity of common law manifests itself in that because there were, until the Statute of Frauds, almost no codifications of relevant law there were some judgements rendered that, from today's perspective, we would perceive as ahead of their time – and others that may seem to have lagged behind.

This article traces the early beginnings of the notion of the inadmissibility of extrinsic evidence, starting with the general distrust toward writing in Anglo-Norman times. We have examined the advent of the sealed document, how it managed to gain increasingly higher ground and how it became the practice in day-to-day relations. We have also observed how the law changed to reflect the social changes – apart from the judges' eagerness to diminish the juries' role, all other changes of concepts described herein were brought about as a result of changes in approach in the society.

All in all, the legal changes described in the article here took place in the search for more justified and fairer judgements. The very same reasons, interestingly, led to the subsequent easing of the rule in the nineteenth century and in modern law.

The parol evidence rule reached its absolute peak significance along with the Statute of Frauds, encompassing all writings, even in the ordinary written form, and many types of legal relations. It was, then, an absolute rule that had no exceptions, yet only for a short period of time. Quickly, exceptions began to appear, and the rule's early rigidness yielded. Nowadays, after the Law Commission which states that the rule is subject to so many exceptions that it hardly exists anymore, one might say that its importance as an absolute rule is purely historical. This is undoubtedly so, but in terms of historical importance it is essential, as the history of the rule's emergence and development shows very well, on the one hand, how total admissibility of extrinsic evidence led to judgements that were simply unfair but,

on the other hand, how the absolutely stringent approach to the rule after it had emerged led to results that were equally unfair.

* * *

The emergence of the parol evidence rule in english law.

Summary: The article discusses the historical development of the parol evidence rule in the English common law from the Anglo-Norman law to the enactment of the Statute of Frauds in 1677. A feature of early English law was the general admissibility of extrinsic evidence contradicting, supplementing or varying the contents of a document. Documents were generally distrusted by a mostly illiterate populace, and there was a common belief that a legal act essentially happened beyond the writing – thus making the writing only, at best, evidential. The needs of commercial practice and the shifting beliefs of a growingly literate society led, in the fifteenth and sixteenth century, to a general conviction that writing encompassed the very essence of a transaction and that a transaction, if written in a document, essentially consisted of the document. This, together with a distrust for juries that were prone to rendering judgements as contradictory to the contents of a document, influenced English judges to form a principle of inadmissibility of extrinsic evidence – the parol evidence rule. Subsequently, the enactment of the Statute of Frauds that required certain transactions to be done in writing was commonly interpreted by English lawyers as statutory acknowledgement and confirmation of the parol evidence rule.

Key words: Common law, history of common law, civil procedure, evidences, history of law.